

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE CAMPBELL,

Defendant-Appellant.

UNPUBLISHED

May 19, 2005

No. 255256

Wayne Circuit Court

LC No. 03-012604

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder,¹ MCL 750.84, felon in possession of a firearm, 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a third-offense habitual offender, MCL 769.11, to four years and nine months to twenty years in prison for the assault with intent to do great bodily harm conviction, two years and six months to ten years in prison for the felon in possession of a firearm conviction and two years in prison for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred when it denied his motion for a directed verdict. We disagree.

A trial court's decision on a motion for a directed verdict in a criminal case is reviewed de novo in a light most favorable to the prosecutor to determine whether a reasonable jury could find the defendant guilty beyond a reasonable doubt. *People v Werner*, 254 Mich App 528, 530; 659 NW2d 688 (2002). The elements of assault with intent to commit murder are: (1) an assault; (2) an actual intent to kill; (3) the success of which would make the killing murder. The intent to kill may be proven by inference, and it may exist without being directed toward a particular victim. *People v Abraham*, 234 Mich App 640, 657-658; 599 NW2d 736 (1999).

Viewing the evidence presented before defendant's motion for a directed verdict in a light most favorable to the prosecution, there was sufficient evidence presented for a rational trier of fact to find beyond a reasonable doubt that defendant intended to kill Officer Seed.

¹ Defendant was originally charged with assault with intent to murder.

Evidence presented at trial indicated that Seed and his partner, Officer Huelsenbeck, attempted to perform a routine traffic stop on defendant. As they approached the car, Huelsenbeck, who approached from the driver's side, noticed defendant draw a handgun from his "waist area." Defendant reached out his right arm and pointed the handgun directly at Seed, who was standing in the passenger's side doorway. Both officers noticed the muzzle of defendant's handgun flash and saw defendant shoot once at Seed. Another witness also noticed defendant draw the handgun from his waist area. A gunshot residue test performed after the incident on defendant's right hand, forehead, and face came back positive and was consistent with defendant firing a weapon. After defendant's vehicle was impounded, an evidence technician recovered a bloody .40 caliber handgun in the armrest while processing the vehicle. When the evidence technician released the magazine on the weapon, a live nine millimeter round fell out. A spent nine millimeter casing was stuck in the barrel. The weapon was jammed because the gun was improperly loaded with nine millimeter ammunition. Therefore, there was sufficient evidence presented for a rational trier of fact to find beyond a reasonable doubt that defendant intended to kill Seed.

Defendant contends that Seed's testimony that he did not hear a bullet pass him or hear an impact in the gas pump directly behind him indicates that there is no concrete evidence that the weapon was fired in the officer's direction. However, both officers testified that the weapon was raised and fired in Seed's direction. Although two witnesses testified that they did not see defendant fire the weapon in Seed's direction, one witness had not testified at the time of the directed verdict motion, and the trial court could only consider evidence presented up to the time of the motion. *People v Riley*, 468 Mich 135, 139-140; 659 NW2d 611 (2003). In addition, the other witness testified that he noticed defendant with the handgun but left the scene before the shooting began. Even so, defendant's argument is a credibility argument. Credibility determinations are properly left to the trier of fact. *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod on other grounds, 457 Mich 885 (1998).

Defendant next argues that the trial court denied him the right to present a defense when it restricted the testimony of a defense witness. We disagree.

We review claims of evidentiary error for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A defendant in a criminal case has the constitutional right to present a defense. US Const, Ams VI, XIV; Const 1963, art 1, § 13; *People v Kurr*, 253 Mich App 317, 326; 654 NW2d 651 (2002). Lay witnesses may testify about opinions and inferences that are rationally based on the witnesses' perception and will help the factfinder gain a clear understanding of the testimony or the determine a fact in issue. MRE 701; *People v McLaughlin*, 258 Mich App 635, 657; 672 NW2d 860 (2003). An opinion or inference may involve the ultimate issue to be decided. MRE 704. Therefore, if the witness' testimony was otherwise relevant, it would not be rendered inadmissible merely because it stated the witness' opinion regarding what had occurred.

Relevant evidence is evidence that is both material and probative. *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Materiality refers to whether a fact is "within the range of litigated matters in controversy." *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000), quoting *People v Mills*, 450 Mich 61, 68; 537 NW2d 909, mod 450 Mich 1212 (1995). A defendant's theory of defense falls within the range of litigated matters. Evidence is probative if it tends to make the existence of a material fact "more or less probable

than it would be without the evidence.” *Sabin, supra*, p 57, citing *Mills, supra*, pp 66-68. Defendant argues that the witness’ opinion was relevant because it corroborated his theory that he acted in self defense when he shot at an unknown perpetrator who was trying to rob him.

Self defense is a complete defense to an otherwise intentional homicide. *People v Riddle*, 467 Mich 116, 126; 649 NW2d 30 (2002). See also *People v Sizemore*, 69 Mich App 672, 674, 676-677; 245 NW2d 159 (1976) (self defense raised as a defense to charge of assault with intent to kill). However, before a defendant can claim self defense, the defendant must establish that he had an honest and reasonable belief that he faced imminent danger of great bodily harm or death and that deadly force was necessary to protect himself. *Riddle, supra*, p 127. An honest belief of imminent danger is insufficient. *People v Daniels*, 192 Mich App 658, 672; 482 NW2d 176 (1991). The reasonableness of the belief is determined by an objective standard. *People v Dabish*, 181 Mich App 469, 477-479; 450 NW2d 44 (1989). Robbery is a crime of violence, assault, or putting in fear, *People v Scruggs*, 256 Mich App 303, 308-309; 662 NW2d 849 (2003), from which a reasonable belief of imminent danger might be inferred. Evidence that an unbiased witness believed a robbery was occurring supported defendant’s contention that his belief of impending harm was reasonable. Thus, the court erred when it determined that the witness’ opinion was irrelevant.

Nevertheless, the erroneous exclusion of evidence does not necessarily require reversal. As explained in *People v Smith (On Remand)*, 249 Mich App 728, 730; 643 NW2d 607 (2002), a preserved nonconstitutional error requires reversal only when a defendant can affirmatively establish it was more probable than not that the error was outcome determinative. However, to the extent defendant claims the erroneous exclusion of the witness’ opinion denied him his constitutional right to present a defense, a preserved constitutional error is reviewed to determine whether there was a reasonable possibility that the evidentiary error might have contributed to the defendant’s conviction. *Id.*

Here, although the court did not permit the witness to give his opinion about what occurred at the gas station, it allowed defendant to elicit testimony from the witness regarding what the witness observed at the gas station. In addition, testimony at trial established that, when he arrived at the hospital shortly after the incident, defendant told a security guard at the hospital that someone tried to rob him at the gas station. Defense counsel also presented during closing arguments the defense theory that defendant believed he was being robbed by the officers and the defense theory regarding the officers’ purported misconduct. Defendant was able to present his defense theory several times throughout the course of the trial. Therefore, there is no reasonable possibility that the evidentiary error might have contributed to his conviction.

Defendant’s third issue on appeal is that the trial court admitted highly prejudicial statements without applying the appropriate evidentiary standard. We disagree.

This Court reviews for a clear abuse of discretion the trial court's decision to admit or exclude evidence. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Id.* Relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403.

Here, evidence that there was an odor of marijuana in defendant's vehicle, a small amount of marijuana found on defendant, and a large amount of cash found on defendant was relevant to defendant's motive in shooting at the police officer. Defendant contends that the trial court admitted the evidence without applying MRE 401 and MRE 403. However, the trial court found that the evidence was relevant because it was "tied to a possible motive for defendant to have pointed and fired his weapon under the circumstances at the gas station," and specifically noted that the evidence was not unfairly prejudicial. Therefore, the trial court applied the correct standard and did not abuse its discretion in doing so.

Affirmed.

/s/ Janet T. Neff
/s/ Donald S. Owens
/s/ Karen M. Fort Hood